Williams

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allied Materials & Equipment Company, Inc.

File: B-235585.2

Date: October 4, 1989

DIGEST

1. Sole-source award of a contract is not objectionable where procuring activity reasonably determined that the using activity had a bona fide urgent need for the items and protester does not dispute agency's finding that only one firm could meet the required urgent delivery schedule.

2. Allegation that urgent need for supplies was created by procuring activity's failure to conduct advance procurement planning is denied where record does not support protester's contention.

DECISION

Allied Materials & Equipment Company, Inc., protests the award of a sole-source contract to David B. Lilly Company, Delfasco Tennessee Division, under request for proposals (RFP) No. DAAA09-89-R-0757. The RFP was issued by the Army Armament Munitions and Chemical Command for 790,000 each BDU-33D/B practice bombs which are used by the Air Force for pilot proficiency training. The Army restricted the acquisition to Lilly on the basis of an identified urgency for these items which only Lilly could meet. Allied essentially contends that a lack of advance planning created the urgency and the sole-source award to Lilly cannot be justified on that basis. We deny the protest.

The Army initially planned to fulfill the Air Force's requirement for the BDUs for fiscal year (FY) 1989 by using the small business set-aside procedures. Consistent with that plan, on November 15, 1988, RFP DAAA09-88-R-1213 was issued as a small business set-aside for 985,760 each BDUs on a with and without first article basis. Under the terms of the RFP as amended and assuming award of a contract by June 1989, delivery of the BDUs, in increments of approximately 90,000 units, was scheduled to commence 210 days after award or 150 days after award if no first article was required, that is, by early 1990.

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However, in April 1989 the Air Force discovered that its actual world-wide inventory to support pilot training was less than 6 months' requirements. On that basis, the Air Force determined that these bombs were in critical short supply and by memoranda dated April 14 and April 20 the Air Force sent an urgent purchase request to the Army requesting that immediate action be taken to secure continuous production of this item for 93,000 each BDUs per month with delivery to commence by July 1989 and continuing through the life of the FY 89 procurement. In response to this urgent purchase request, the Army issued Amendment 0005 to RFP - 1213 on May 10, 1989, which, among other things, reduced the quantity of bombs called for in that solicitation by 790,000--the minimum quantity identified as meeting the Air Force's urgent need. On that same day, Lilly was awarded a contract for that quantity and a May 10 news release announcing the award was issued. Allied protested this award to our Office on June 6.

As a threshold issue, the Army and Lilly both argue that Allied's protest is untimely and should not be considered. The agency contends that Allied knew by May 10 of the award to Lilly yet did not protest until June 6, more than 10 working days later. In response, the protester states that it first became aware of the news release on May 22, not May 10; thus, its June 6 filing was timely. Lilly, on the other hand, asserts that even assuming Allied learned of the award on May 22, its protest is still untimely because its copy of Allied's protest shows our time and date stamp of June 8, 12 working days after Allied knew of the award.

Although Allied has a copy of the protest letter we received by mail on June 8, we also received a telefacsimile transmission of the protest on June 6. Since June 6 is within 10 working days of May 22, and since there is no evidence that Allied knew prior to May 22 of the award, we resolve all doubts regarding timeliness in favor of Allied. We thus find Allied's protest timely.

On the merits, the crux of Allied's protest is the Army's determination that the Air Force's need was sufficiently urgent to justify a sole-source award. Allied contends that the urgency was due to the agency's lack of advance planning, and notes that the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f)(5)(A) (1988), expressly prohibits noncompetitive awards on that basis. In this regard, the protester maintains that both the Army and the Air Force have long experience with the Air Force's monthly needs and the time involved in the successful testing and production of the BDUs. Nonetheless, the protester insists,

the Army failed to develop an adequate plan so that the FY 89 acquisition could be competed in a timely manner to meet the Air Force's needs.

The record shows that a Justification and Approval (J&A) for using other than full and open competitive procedures due to compelling urgency was approved by the head of the contracting activity on May 16, 1989. The authority cited for this procurement is 10 U.S.C. § 2304(c)(2) (1988), which allows the head of a procuring agency to authorize use of other than competitive procedures in awarding a contract when the agency's requirements are of such an unusual and compelling urgency that the government would be seriously injured if the agency was not permitted to limit the number of sources from which it solicits bids or proposals.

The J&A states that the only responsible source that can provide continuous production of the BDUs and begin delivery by July 30 is Lilly. According to the J&A, Lilly is the only contractor capable of meeting the accelerated delivery schedule since the firm is a mobilization producer currently in production for this item and is the only active producer eligible for waiver of the first article requirement.1/ The J&A also indicated that there was insufficient production lead time for any other source to meet the July 30 delivery date and any delay in making award would adversely affect the Air Force mission capabilities since the lack of bomb production would require cancellation of the Air Force pilot proficiency training and significantly reduce the number of certified Air Force pilots.

In view of the importance of achieving full and open competition in government procurement, we closely scrutinize any exception to that mandate such as that provided by 10 U.S.C. § 2304(c)(2). In doing so, however, we recognize that an agency using the urgency exception, as here, may restrict the acquisition to the firms it reasonably believes

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1/ The protester does not dispute that Lilly is the only contractor that qualifies for waiver of first article testing. Neither does Allied challenge the Army's finding that only Lilly can perform by the required delivery dates.

can properly meet agency needs in the required time. See Support Systems Assocs., Inc., B-232473 et al., Jan. 5, 1989, 89-1 CPD ¶ 11 at 8; Honeycomb Company of America, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209. We will object to an agency's determination to limit competition due to unusual and compelling urgency if we find that the agency's decision lacks a reasonable basis. Gentex Corp., B-233119, Feb. 13, 1989, 89-1 CPD ¶ 144. In this case, we find the award to Lilly is not legally objectionable because the record supports the Army's position that a legitimate urgency, not created by lack of advance procurement planning, existed and only Lilly could meet the Air Force's minimum needs within the required time.

In its comments on the bid protest conference, the Army detailed how in previous years the Air Force had relied on a mathematical formula or model to forecast its requirement for practice bombs and how this method of forecasting its needs adversely affected the accuracy of the Air Force's projection of its needs. The Army reports that in 1988 the Air Force decided to use actual use data to forecast its requirement. Actual use data became available in March 1989 at which time the first quarterly report indicated that the Air Force had overestimated contract due-ins by 300,000 and underestimated its monthly use by approximately 10,000 units.

We reiterate that the circumstances of this case do not warrant a finding that the Army failed to perform advance planning which allegedly created the urgency. We think that the record is replete with evidence that in planning this FY buy for BDUs, the Army commenced substantial action to effectuate a timely competitive procurement. However, the procuring activity relied on erroneous inventory and acquisition data provided by the requiring activity which masked the true inventory levels for this item. When it became apparent that the Air Force's inventory was near depletion, a bona fide urgency existed that, under CICA, could be met through the use of noncompetitive procedures to

satisfy the agency's minimum needs. Therefore, we have no legal basis on which to object to the award to Lilly. See Honeycomb Company of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579; Cerberonics, Inc., B-225626 et al., Apr. 30, 1987, 87-1 CPD ¶ 463.

The protest is denied.

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for James F. Hinchman
General Counsel